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No 83-477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EARLE M. JORGENSEN COMPANY, et al
Petitioners,

v.

THE CITY OF SEATTLE, WASHINGTON
Respondent.

On Writ Of Certiorari
To The Supreme Court Of
The State Of Washington

PETITIONER'S REPLY MEMORANDUM

COUNSEL OF RECORD

EDMUND J. WOOD
LAW OFFICES OF EDMUND J. WOOD, P.S.
204 Grand Central Building
216 First Avenue South
Seattle, Washington 98104
(206) 623-4382

ADDITIONAL COUNSEL FOR PETITIONERS:

J. JEFFREY DUDLEY
CARTANO BOTZER LARSON & BIRKHOLZ
25th Floor, One Union Square
Seattle, Washington 98101
(206) 623-6700

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PETITIONER'S REPLY MEMORANDUM

1. Section 121(a) of PURPA requires that affected ratepayers be granted the right to "intervene" as well as the right to "participate" in nonregulated utilities' rate proceedings, neither of which requirement is satisfied by providing only passive observation of the public meetings of a legislative body.

The City argues that the requirements imposed by Section 121(a) of PURPA are met by providing what is characterized as a "legislative mode of participation" (Br.Resp.pp. 2,3,10). The court below, in describing this "legislative mode of participation", acknowledged that "(g)enerally, we have not imposed procedural requirements upon legislative decisions" (Pet. App.p.13a), and found the

only procedural limit imposed by state law on the operation of the legislative process to be a requirement that persons be allowed the passive right to "attend and participate in public meetings of the city council. R.C.W. 35.24.180."(Pet.App.p.15a)[1]

It is impossible to reconcile the City's position with the comment of the Congressional conferees that the intervention and participation provisions of PURPA were adopted "in recognition of the reliance they place on intervention and participation in these proceedings to further the purposes of this title.[2] Indeed, it is difficult to imagine why Congress would have bothered to "extend" federal protection to the right of passive observation of the legislative process, since such passive observation alone neither significantly advances the purposes of PURPA, nor appears to need Congressional protection.[3]

The City also cites *Vermont Yankee Nuclear Power Corp. V. NRDC*, 435 U.S. 519 (1978), as upholding "similar legislative, rather than judicial, procedures for 'participation'[4] in federal rulemaking under Section 4 of (sic) Administrative Procedure Act (5 U.S.C. §533)" (BR.Resp. p.3). It is useless to discuss the meaning of the term, "participation", in isolation from its conjunctive "intervene", for Congress afforded affected ratepayers the opportunity to intervene

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[1] Quoting from *King Cy. Water Dist. 54 v. King Cy. Boundary Review Bd.*, 87 Wn.2d 536, 546, 554 P.2d 1060 (1976). R.C.W. 35.24.180 merely provided in relevant part that "All meetings of the city council must be public."

[2] H.R.CONF.REP. NO.95-1750, 95TH Cong., 2nd Sess. 81, *reprinted in* 1978 U.S.CODE CONG. & AD. NEWS 7797, 7815.

[3] *See generally, Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 (BRENNAN, J., concurring). *See also* note 1, *supra*.

[4] Neither Section 4 of the Administrative Procedure Act (5 U.S.C. §553) nor *Vermont Yankee* discusses the meaning of the term, "participation". The relevance of these authorities to this case appears to depend upon the acceptance of the respondent's unstated conclusion that they somehow provide a federal definition of the term "participation".

as well as participate "as a matter of right",[5] in rate proceedings. The term, "intervene" has a clear meaning in federal procedure.[6] Even more important, the term has been used frequently by Congress in recent years, almost always to connote the right of participation in a judicial type of proceeding.[7]

2. PURPA does not purport to preserve a distinction between privately and publicly owned utilities.

The City argues that the Washington State Supreme Court has acted to preserve "the distinction between private utilities regulated by State utility commissions and public utilities having the authority to set rates by legislation" (Br.Resp. p.5). However, PURPA ignores any classification of utilities based on ownership. The Act instead seeks to include all utilities within its scope, and classifies utilities only on the basis of whether they are "regulated" or "unregulated"[8]. The term "unregulated" is not congruent in application with the term "publicly owned,"[9] a fact which must have been known to Congress when enacting PURPA. Whatever value the distinction between public and private ownership of utilities retains for other purposes, it is clear that a classification based on ownership plays no such important roll in PURPA.

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[5] 16 U.S.C. §2631(a).

[6] *See, e.g.*, FED.R.CIV.P.24, allowing any qualified person to "intervene" in federal litigation.

[7] *See, e.g.*, Indian Child Welfare Act of 1978, P.L. 95-608, §101(c), 92 Stat. 3071, codified at 25 U.S.C. §1911(c)(right granted to Indian child, its custodian or guardian); Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, §520(c)(2), 91 Stat. 503, codified at 30 U.S.C. §1270(c)(2) (right granted to the Secretary of Interior);

[8] 16 U.S.C. §2602.

[9] Indeed, this Court just last term upheld assertion of state regulatory jurisdiction over one form of just such a "public" utility. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm.*, ___U.S.___, *103 S. Ct. 1905, 76 L.Ed.2d 1 (1983).*

CONCLUSION

For the reasons stated in the petition for writ of certiorari, and in this reply, a writ should issue to review the judgment and opinion of the Washington State Supreme Court.

Respectfully submitted this 28th day of October, 1983.

EDMUND J. WOOD
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216 First Avenue South
Seattle, Washington 98104
(206) 623-4382

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